STATE OF MICHIGAN

IN THE SUPREME COURT

HEATHER LYNN HANNAY,

Plaintiff-Appellee,

-vs-

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

Supreme Court No. 146763

Court of Appeals No. 307616

Court of Claims No. 09-116 MZ(A)

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

CERTIFICATE OF SERVICE

*** ORAL ARGUMENT REQUESTED ***

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

GURSTEN, KOLTONOW, GURSTEN, CHRISTENSEN & RAITT, P.C.

DAVID E. CHRISTENSEN (P45374)
Attorney for Plaintiff-Appellee
30101 Northwestern Highway
Farmington Hills, MI 48334
(248) 353-7575

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authorities

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS AND THE COURT OF CLAIMS CORRECTLY RULE THAT PLAINTIFF WAS ENTITLED TO RECOVER HER WORK LOSS DAMAGES IN THIS CASE GOVERNED BY MCL 691.1405?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

II. DID THE COURT OF APPEALS AND THE COURT OF CLAIMS PROPERLY RULE THAT, BASED ON THE EVIDENCE PRESENTED AT TRIAL, PLAINTIFF WAS ENTITLED TO RECOVER WORK LOSS BASED ON THE AMOUNTS THAT SHE WOULD HAVE EARNED AS A DENTAL HYGIENIST?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

STATEMENT OF FACTS

This case arises out of a February 13, 2007 accident in which the driver of a Michigan Department of Transportation (MDOT) salt truck failed to heed a stop sign and struck the car being driven by Heather Hannay. Ms. Hannay was seriously injured in the accident.

At the time of the accident, Ms. Hannay was twenty-two years old. Long before the accident occurred, Ms. Hannay had her career path planned; she wanted to work in a dentist office as a dental hygienist. (App. 40a, 52b). Ms. Hannay graduated from high school in 2003 and enrolled in Lansing Community College the same year. (App. 46a). She earned her associates degree from Lansing Community College (hereinafter: LLC) and sought admission to that school's dental hygienist program.

Admission into the two year dental hygiene program at LCC is based on multiple factors, with applicants earning points which would be totaled to determine who would be accepted into the program. Thus, for example, points would be earned for achievement in school or for an applicant's experience working in a dentist's office.

While Ms. Hannay was still a teenager, her grandmother went to an appointment with her dentist, Dr. Mark Johnston. Ms. Hannay's grandmother told one of the dental hygienists working at Dr. Johnston's office that her granddaughter was very interested in becoming a dental hygienist. (App. 5b-6b).

The dental hygienist to whom Ms. Hannay's grandmother spoke was Mary Johnston, Dr. Johnston's wife and the head hygienist in his office. Dr. and Mrs. Johnston invited Ms. Hannay to come to their dental office to observe its operations. (App. 6b). By observing a dental office for a period of ten hours, Ms. Hannay would earn points toward admission to LLC's dental hygienist

program. (*Id*).

Ms. Hannay enjoyed the work in the dental office so much that, after completing the required ten hours, she decided to keep working at Dr. Johnston's office. For a period of approximately three months, Ms. Hannay worked on an unpaid basis in the office performing a number of different jobs. (App. 6b, 12b).

After working as a volunteer for three months, Mrs. Hannay's performance was impressive enough that Dr. Johnston hired her on a part time basis beginning in February 2006. (App. 13b, 17a). Four months after she began working at Dr. Johnston's office she was given a raise. She received another raise in January 2007. (App. 17a). When she was originally hired, Ms. Hannay continued to perform a number of different jobs within Dr. Johnston's office. (App. 13b). However, as time went on, Ms. Hannay spent more time directly assisting Dr. Johnston while he was working on patients. (App. 6b, 14b).

As of February 2007 when she sustained her injuries, Ms. Hannay was going to school and working two part-time jobs, one of which was in Dr. Johnston's office. (App. 41a). She was working 25 hours or more per week at Dr. Johnston's office. (App. 42b). Dr. Johnston wanted Ms. Hannay to work more hours and asked her to take a full-time job. (*Id*). Because of her school and other work commitments, Ms. Hannay declined Dr. Johnston's offer. Dr. Johnston did, however, tell Ms. Hannay that when she completed her dental hygienist program, he would hire her immediately as a hygienist at $25.00 per hour. (App. 44a).

Meanwhile, Ms. Hannay completed all of her prerequisites for entry into LLC's dental hygienist program. (App. 10b). She applied for admission to the program. Unfortunately, her application was misfiled by the program's administrators and, as a result, she was not considered for

admission at that time. (App. 43a, 53b).

Ms. Hannay continued to take classes to accumulate the necessary points to gain admission to the dental hygienist program. (App. 51b). She applied for entry into the program a second time, but because of the state of the economy, the pool of applicants included a significant number of nurses who had bachelor of arts degrees, giving them more points than Ms. Hannay. Ms. Hannay was, however, well aware of the fact that it was common for applicants to LLC's dental hygienist program to apply three or four times before gaining admission. (App. 44a).

The February 2007 accident put an end to Ms. Hannay's plans to become a dental hygienist. She suffered significant injuries to her neck and shoulder making it impossible for her to perform many of the essential functions of that job. (App. 39b).

In October 2007, Ms. Hannay filed separate actions against MDOT and the MDOT employee whose negligence caused the February 2007 accident. Ms. Hannay's cause of action against the individual defendant was later dismissed and the case proceeded in the Court of Claims against MDOT.

A bench trial was held over a four day period in October 2011. At trial, MDOT conceded that its agent was negligent in the February 2007 accident. The trial was, therefore, largely confined to the issue of damages.

For purposes of the issues being raised on this appeal, the two most important witnesses who testified at that trial were Dr. Johnston and his wife and chief hygienist, Mary Johnston. Dr. Johnston could tell from the period of time that Ms. Hannay worked in his office that she loved dentistry. (App. 7b). After observing Ms. Hannay's work for some time, Dr. Johnston concluded that Ms. Hannay "was destined to work in a dental office." (*Id*). He further testified that Ms.

Hannay had completed all of the requirements for admission to LLC's dental hygienist program and that she was "well on her way to getting into the program . . ." (App. 8b).

Mrs. Johnston was uniquely qualified to testify to the job that Ms. Hannay would have had but for the February 2007 accident. Mrs. Johnston was a senior clinical instructor in LLC's dental hygienist program for a period of eight years. (App. 30b-31b). She is also a dental examiner for the Northeast Regional Board. (App. 29b). In that role, she travels to dental schools and dental hygienist schools within her region to administer licensing examinations.

Based on her role as a senior clinical instructor at LCC, Mrs. Johnston was very familiar with the admissions process for that school's dental hygienist program and what was required for admission into that program. (App. 31b). Mrs. Johnston described Ms. Hannay as having a passion for dentistry and that Ms. Hannay possessed the "whole package" necessary to become an exceptional dental hygienist. (App. 39b).

Mrs. Johnston was also emphatic in her assessment of Ms. Hannay's prospects of getting into the dental hygienist program at LCC. Mrs. Johnston testified that, prior to the February 2007 accident, Ms. Hannay had achieved more than enough points to get into the program. (App. 37b). As to whether Ms. Hannay would, in fact, gain admission into the program, Mrs. Johnston testified:

Q. Would you say that it's more likely than not that Heather would have been admitted into the program?

A. I think absolutely she would have been admitted into the program.

* * *

Q. Would it be fair to say that in the case of Heather that it was just a mater of time . . .

A. Yes.

Q. . . . before she was admitted?

A. Yes.

(App. 38b-39b).

Both Dr. and Mrs. Johnston testified that, once entering the dental hygienist program, very few students drop out. (App. 15b-16b, 36b). In the eight years that Mrs. Johnston served as a senior clinical instructor at LCC, only four or five students left the program. (*Id.*)

Mrs. Johnston further testified that, after Ms. Hannay completed the dental hygienist program, she would have hired Ms. Hannay so that she (Mrs. Johnston) could retire. (App. 39b).

On November 18, 2011, the Court of Claims issued a written opinion setting out its findings of fact and legal conclusions. (App. 59a-74a). The Court of Claims first rejected MDOT's contention that Ms. Hannay was not entitled to economic damages. (App. 69a-70a). The court further ruled that Ms. Hannay was entitled to work loss benefits calculated on the basis of work she would have performed as a dental hygienist. The Court of Claims explained this aspect of its ruling as follows:

> At the time of the accident, Plaintiff was enrolled at LCC, working towards the Dental hygienist program. She was already employed with Dr. Johnston as a dental assistant. LCC's Dentist hygienist program has an objective admissions process based on a total of points earned. This Court finds that Plaintiff would more likely than not have been admitted into the Dental hygienist program at LCC. Plaintiff has admitted into evidence a copy of Plaintiff's transcripts, and testimony from an employee of LCC's Dental hygienist program. Mrs. Mary Johnston was employed at LCC as a clinical instructor in the Dental hygienist program, as well as a dental hygienist with her husband, Dr. Mark Johnston. After explaining the process, Mrs. Johnston stated Plaintiff would have successfully completed the program. This Court further finds that Plaintiff would more likely than not have successfully completed the program.
>
> Plaintiff testified she was offered a job with Dr. Johnston as a dental hygienist. According to Plaintiff, the job was for approximately $25.00 per hour at full time

> employment. She also stated she was being hired to replace Mrs. Johnston so that Mrs. Johnston could retire, Mrs. Johnston verified this in her testimony. Dr. Johnston testified that all of his dental hygienist started work at $28.00 to $31.00 an hour. However, according to Dr. Johnston's testimony, his wife, Mrs. Johnston only works part time in his office. He further stated he currently has no full time hygienists on staff. Mrs. Johnston testified she only works three days a week as a dental hygienist. This Court finds that Plaintiff has not met the burden of full time employment with Dr. Johnston; however, Plaintiff has proven part time employment of three days a week.
>
> Dr. William King, an expert on financial modeling, provided testimony and exhibits calculating a dental hygienist's wages over a career. He provided numbers based on the national average and numbers based on the $28.00 an hour Dr. Johnston testified to. These numbers were used also based on full time employment by Plaintiff's request. Dr. King calculated Plaintiff would earn $1,278,460.00 reduced to present value over her lifetime as a full time employee. However, Plaintiff has only proven part time employment, approximately 60% of full time. Therefore, this Court awards Plaintiff $767,076.00 for wage losses.
>
> (App. 71a-72a).

MDOT appealed from the November 18, 2011 ruling, raising two issues. It claimed that under the language of MCL 691.1405, Ms. Hannay could not recover any of her economic damages. Second, MDOT contended that Ms. Hannay was not entitled to work loss benefits calculated on the basis of future employment as a dental hygenist.

A panel of the Court of Appeals issued its decision on January 17, 2013. *Hannay v Michigan Department of Transportation*, 299 Mich App 261; 829 NW2d 883 (2013). The panel rejected both of MDOT's arguments and it affirmed the Court of Claims judgment.

MDOT applied for leave to appeal in this Court. On September 27, 2013, the Court issued an order granting leave to appeal. *Hannay v MDOT*, ___ Mich ___; 836 NW2d 694 (2013). The grant of leave was limited to the issues of "whether economic loss in the form of wage loss may qualify as a 'bodily injury' . . . under the motor vehicle exception to governmental immunity," and

"whether the evidence in this case establishes that plaintiff incurred a loss of income from work that she would have performed as opposed to loss of earning capacity."

ARGUMENT

I. WHERE PLAINTIFF SUSTAINED ECONOMIC DAMAGES RESULTING FROM THE INJURIES CAUSED BY DEFENDANT'S NEGLIGENCE, THESE ECONOMIC DAMAGES ARE RECOVERABLE IN A CASE IN WHICH THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY APPLIES.

MDOT contends that the Court of Claims erred in awarding Ms. Hannay her economic damages that resulted from the February 2007 accident. MDOT maintains that these damages are not recoverable in any action against a governmental entity exempted from a defense of governmental immunity on the basis of MCL 691.1405. MDOT grounds its argument in the language of §1405, which provides that governmental agencies "shall be liable for bodily injury and property damage" that result from the negligent operation of a motor vehicle by one of its agents. MDOT contends that the economic damages that Ms. Hannay was awarded in this case do not constitute "bodily injury or property damage" for purposes of §1405 and, thus, are not recoverable.

MDOT's suggested interpretation of §1405 is based on this Court's decision in *Wesche v Mecosta Co. Road Commission*, 480 Mich 75; 746 NW2d 846 (2008). In that case, Daniel Wesche was injured when a county-owned vehicle struck the rear of his car. Mr. Wesche sued the county road commission for these injuries. He was joined in that suit by his wife, who claimed loss of consortium damages. This Court ultimately ruled that Mrs. Wesche's consortium claim could not be pursued under §1405 since that claim did not constitute a "bodily injury" under that statute. MDOT argues that this case is controlled by the Court's holding in *Wesche*. There are a number of reasons why MDOT's arguments have to be rejected.

A. The *Wesche* Court's Construction Of The Term "Bodily Injury" Needs To Be Reexamined.

The term "bodily injury" is not defined in §1405 or any other provision of the Government Tort Liability Act (hereinafter GTLA). This omission sent the *Wesche* majority directly to their dictionaries. Based on dictionary definitions, the Court in *Wesche* announced that the term "bodily injury" as used in §1405, "is not difficult to understand." 480 Mich at 84. According to the *Wesche* majority and the 2000 edition of the *Random House Webster's College Dictionary*, "bodily" means either "of or pertaining to the body" or, alternatively, "corporeal or material as contrasted with spiritual or mental." 480 Mich at 84. The word "injury", according to the *Wesche* Court, means "harm or damage done or sustained, [especially] bodily harm." *Id.*, at 84-85. Melding these two dictionary definitions together, the *Wesche* majority arrived at the conclusion that "bodily injury" for purposes of §1405 means a "physical or corporeal injury to the body." On the basis of this definition, the *Wesche* Court found that the consortium claim at issue in that case did not fall within the "bodily injury" language of §1405.

The definition of "bodily injury" established in *Wesche* is at the center of MDOT's argument in this case. It claims that the work loss that Ms. Hannay sustained as a result of the February 2007 accident does not constitute a "bodily injury" for purposes of §1405.[1]

This Court should use this case to reexamine how it arrived at its interpretation of the term "bodily injury" in *Wesche*. Rather than immediately reaching for a dictionary in an attempt to give meaning to statutory language, this Court should have looked elsewhere for an understanding of what

---

[1]In the next two subsections of this brief, plaintiff will address why Ms. Hannay must be allowed recovery for her work loss under the analysis and holding in *Wesche*. But, before addressing these points, the Court should revisit the dictionary definitions resorted to in *Wesche*.

the Legislature meant when it enacted §1405. As will be seen, there is in the very language of the GTLA a means of understanding and applying §1405's language which is far superior to any guidance that might be provided by the 2000 edition of the Random House Webster's College Dictionary.

This brief will not engage in an extended discussion of the wisdom or reliability of a dictionary-based approach to statutory interpretation. *See e.g.* Brudney, *Oasis Or Mirage: The Supreme Court's Thirst For Dictionaries In The Rehnquist And Roberts Eras,* 55 Wm. & Mary L Rev 483 (2013); Randal, *Dictionaries, Plain Meaning and Context In Statutory Interpretation,* 17 Harv J L & Pub Policy 71 (1994). It is, however, somewhat difficult to understand how this Court, which prides itself in eschewing "extra-textual" tools in the interpretation of statutory language, *cf People v Schaefer,* 473 Mich 418, 431-432; 703 NW2d 664 (2005); *Lansing Mayor v Pub Service Comm,* 470 Mich 154, 164-165; 680 NW2d 840 (2004), should so readily resort to dictionary definitions in seeking out the intent of the Michigan Legislature in enacting a statute. One is certainly left to wonder whether any member of the Michigan Legislature had the *Random House Webster's College Dictionary* at the ready when §1405 was passed.[2] One could just as easily speculate that the Michigan Legislature actually had a different dictionary in mind when it adopted the "bodily injury" language in §1405. One could also envision another dictionary (or perhaps the same dictionary) with diverse definitions of the same word. How, in these circumstances, does a court choose between the Random House Websters College Dictionary and, let us say, the Oxford English Dictionary?

---

[2]This would have been impossible in light of the fact that the version of the *Random House Webster's College Dictionary* relied on by the *Wesche* Court was apparently printed in 2000, approximately 35 years after §1405 was passed.

It is difficult to understand how one cannot refuse to give weight to any interpretive guide as "extra-textual," while at the same time giving immediate and inordinate weight to something equally "extra-textual" to a statute's language, an entry in one's dictionary of choice.

A far more sophisticated and far more legitimate approach to the determination of legislative intent should at least begin with a focus on the actions of the Michigan Legislature itself. Such an approach is available in the interpretation of the language in §1405, and that approach leads to a substantially different conclusion than the dictionary-infused approach employed in *Wesche*. In light of the fact that this Court has emphatically and repeatedly instructed that the goal of statutory construction is to determine legislative intent based on the "words actually used in the statute," *Smitter v Thornapple Township*, 494 Mich 121, 125; 833 NW2d 875 (2013), it is logical to assume that the text of the GTLA is a superior indicium of the Michigan Legislature's intent in passing §1405 then the contents of a dictionary.

There is significant support in the language used in the GTLA's six exceptions to immunity for the conclusion that the term "bodily injury" as used in §1405 was not meant to limit in any way the scope of the damages that a plaintiff might recover in a tort action exempted from immunity under that statute. The first relevant section in the GTLA on this subject is MCL 691.1402, the highway exception to immunity. That statue provides in relevant part:

> (1) Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. *A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the* ***damages*** *suffered by him or her from the governmental agency.* The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. Except as provided in section 2a, the duty of a governmental agency

> to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.
>
> (2) A municipal corporation has no duty to repair or maintain, and is not liable for injuries or ***damages*** arising from, a portion of a county or state highway.
>
> * * *
>
> (4) The contractual undertaking of a governmental agency to maintain a state trunk line highway confers contractual rights only on the state transportation department and does not confer third party beneficiary or other contractual rights in any other person to recover ***damages*** to person or property from that governmental agency. This subsection does not relieve the state transportation department of liability it may have, under this section, regarding that highway.
>
> (emphasis added).

The second sentence of §1402(1) uses the same initial language as §1405; a party injured as a result of an unsafe highway may sue for "bodily injury." Yet, in the very same sentence, §1402(1) confirms the scope of the damages that are recoverable for such a "bodily injury": the injured party "may recover *the damages suffered by him or her.*" (emphasis added). There is obviously no limitation in this language as to the damages recoverable for the "bodily injury" sustained in a case governed by §1402; that injured party can recover *all* damages, both economic and noneconomic, that he/she sustained. This language confirms that the damages subsumed within the "bodily injury" language of §1402 include all traditional tort damages, allowing recovery for any "damages suffered by him or her."

MCL 691.1402(2) and (4) reinforce this point. Both of these subsections refer to a governmental agency's liability for *damages* sustained due to a defective highway. Again, there is

nothing in the language of these two sections suggesting that the damages available in a case governed by §1405 is somehow to be distinguished from the damages available in any other negligence case.

This point is reaffirmed in the next section of the GTLA, MCL 691.1403. That statute incorporates an actual/constructive knowledge requirement into any action based on a defective highway:

> No governmental agency is liable for *injuries* or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the *injury* took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the *injury* took place.
>
> MCL 691.1403 (emphasis added).

The causes of actions described in §1402 and §1403 are precisely the same. Both statutes describe the scope of a governmental entity's liability arising out of the failure to keep a highway in reasonable repair. One of those statutes, §1402, begins by describing such cases as seeking recovery for "bodily injury," while the other simply describes these cases as ones in which the plaintiff may recover for "injuries or damages caused by a defective highway." A comparison of §1402 and §1403 reveals that in those two provisions of the GTLA, the Michigan Legislature treated that the terms "bodily injury" and "injury" as synonymous.

Precisely the same analysis applies to MCL 691.1404, the provision of the GTLA requiring pre-suit notice in a defective highway claim asserted under §1402. That statute specifies:

> As a condition to *any recovery for injuries sustained* by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the

> governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> MCL 691.1404(1) (emphasis added).

Once again, §1404 indicates that in an action for "bodily injury" under §1402, the plaintiff may recover the *injuries* sustained as a result of a highway defect.

The Michigan Legislature's interchangeable use of the words "bodily injury" and "injury" in the GTLA is also reflected in the public building exception to governmental immunity, MCL 691.1406. That statute renders governmental entities liable for injuries resulting from defects in public buildings; it also contains a notice provision. Thus, MCL 691.1406 provides in relevant part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for *bodily injury* and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. . . As a *condition to any recovery for injuries sustained by reason of any dangerous or defective public building*, the injured person, within 120 days from the time the *injury* occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the *injury* sustained and the names of the witnesses known at the time by the claimant.
>
> MCL 691.1406 (emphasis added).

MCL 600.1406 *twice* describes the nature of an action that may be instituted against a governmental entity based on an injury resulting from a defective public building. The second sentence of §1406 specifies that "[g]overnmental agencies are liable for *bodily injury* and property damage resulting from a dangerous or defective condition of a public building." (emphasis added). Thus, the second sentence of §1406 uses the same term as §1405.

That same paragraph, however, contains a notice provision specifying that the scope of an injured person's recovery is "for *injuries* sustained by reason of any dangerous or defective building." (emphasis added). Once again, §1406 demonstrates that the "bodily injury" caused by governmental negligence cannot be confined as MDOT claims in this case. Thus, "bodily injury" for purposes of §1406 does not somehow exclude economic (or noneconomic) damages; rather it includes recovery for all injuries sustained as a result of a defective public building.

Another provision of the GTLA instructive on this issue is the proprietary function exception to immunity, MCL 691.1413, which states:

> The immunity of the governmental agency shall not apply to actions to recover for *bodily injury or property damage* arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency *for injury or property damage* arising out of the operation of proprietary function, except for *injury* or loss suffered on or after July 1, 1965.

Id. (emphasis added).

What is significant about MCL 691.1413 is that in the first sentence of that statute, the Legislature used the term "bodily injury," the same term that it employed in §1405. Thus, the first sentence of MCL 691.1413 specifies that immunity does not extend to actions to recover for "bodily injury" arising out of the performance of a governmental entity's proprietary function.

The third sentence of §1413 places a temporal limitation on cases that may be brought under this proprietary function exception: "No action shall be brought against the governmental agency for *injury* or property damage arising out of the operation of proprietary function, except for *injury* or loss suffered on or after July 1, 1965." *Id.* (emphasis added). Thus, the first and third sentences

of that statute describe precisely the same types of action - tort claims that arise out of a governmental agency's performance of a proprietary function. Yet, the first sentence of §1413 describes these claims as ones seeking recovery for "bodily injury," while the third sentence twice describes them as actions seeking recovery for an "injury." What is obvious from §1413 is that the Michigan Legislature considered the terms "bodily injury" and "injury" to be synonymous.

In enacting the defective highway, defective building and proprietary function exceptions to governmental immunity, the Michigan Legislature equated "bodily injury" with traditional tort remedies. This is particularly significant in light of the fact that §1402, §1406 and §1413 were part of P.A. 1964, No. 170, the same public act that contained §1405. Thus, in light of the foregoing discussion of the highway, public building and proprietary function exceptions, to accept MDOT's argument that Ms. Hannay's economic damages are not subsued within §1405's "bodily injury" language, one would have to arrive at the conclusion that the Michigan Legislature used the very same term, "bodily injury," in four statutes passed the same day and in three of these statutes that term was mean to encompass *all* available tort remedies, yet in the fourth, §1405, the term "bodily injury" somehow means something remarkably different. This assumption makes absolutely no sense. *Empire Iron Mining v Orhanen*, 455 Mich 410, 426, n. 16; 565 NW2d 844 (1997); ("Identical language should certainly receive identical construction when found in the same act."); *Robinson v City of Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (when the Legislature "use the same phrase in a statute, that phrase should be given the same meaning throughout the statute."); *People v Wiggins*, 289 Mich App 126, 128-129; 795 NW2d 232 (2010); *cf People v Couzens*, 480 Mich 240, 249-250; 747 NW2d 849 (2000).

The appropriate approach to determining the definition of "bodily injury" in §1405 is aptly demonstrated in the Court's decision in *MEA v Secretary of State (On Rehearing)*, 489 Mich 194; 801 NW2d 35 (2011). The issue presented in that case involved the interpretation of a provision in Michigan Campaign Finance Act (MCFA), MCL 169.257(1). The majority ruled in *MEA* that a payroll deduction plan administered by the plaintiff ran afoul of that provision.

In *MEA*, the dissent took the position that the payroll deduction plan was exempted from MCL 169.157 by another provision of the MCFA, MCL 169.206(2)(c). The majority acknowledged that the dissent would be correct if §206(2)(c) were read "in isolation." 489 Mich at 214, n. 14. But, the majority ruled that in determining the reach of the exception contained in that subsection, the MCFA had to be read as a whole. The majority then identified a third section of the MCFA, MCL 169.255(1), which used language similar to the statute relied on by the dissent.

The majority ruled that the Court was compelled to consider §206(2)(c), the provision relied on by the dissent, and §255(1) together to achieve consistency within the MCFA. To that end, the majority in *MEA* held that §206(2)(c), "which uses nearly identical language [to §255] must be interpreted in the same way, 'so as to produce . . . a harmonious and consistent enactment." *Id.*, at 215, n. 14, *quoting State Treasurer v Wilson*, 423 Mich 138, 145; 377 NW2d 703 (1985).

The analysis employed by the Court in *MEA* has to be applied in this case to arrive at the appropriate construction of the term "bodily injury" in §1405. The Court has clear indications in three other sections of the GTLA passed the same day as §1405 which demonstrate that the phrase common to all four, "bodily injury", cannot be limited as MDOT proposes in this case.[3]

---

[3]There is yet another section of the GTLA which cannot be toward harmonized with MDOT's conception of the scope of damages available to Ms. Hannay. That other section, MCL 691.1407(1), will be discussed in the next section of this brief.

There are two notable differences between the statutory scheme presented to this Court in *MEA* and that involved in this case. Both of these differences establish that the need to harmonize §1405 with the three other statutes passed the same day is even stronger than it was in *MEA*. In *MEA*, the Court considered itself compelled to construe two provisions in a larger act in a harmonious way where the language used in these two provisions was "nearly identical." Here, the critical language used in §1402, §1406, §1413 and §1405 - "bodily injury" - *is* identical.

Moreover, the Court in *MEA* ruled that *two* provisions in an act had to be construed harmoniously. Here, there are *four* relevant provisions in the GTLA, three of which allow for full tort recovery for a "bodily injury". Rather than resorting to the 2000 edition of *Random House Webster's College Dictionary* to ascertain what the Michigan Legislature intended when it enacted §1405, this Court must glean that intent by analyzing the GTLA itself and by treating that act as "an harmonious and consistent enactment." *MEA*, 489 Mich at 214, n. 14. "Bodily injury" in §1405 should be the same as "bodily injury" in §1402 or §1406 or §1413.

The *Wesche* Court's instinctive resort to a dictionary to define "bodily injury" in §1405 was inappropriate. The Court should look for the meaning of that phrase in the language chosen by the Michigan Legislature in enacting the GTLA. Approaching this statutory interpretation question properly, the Court must reject MDOT's proposed construction of §1405.

B. §1405 Allows Recovery Of Any Damages, Including Economic Damages, Arising Out Of A Bodily Injury.

MDOT does not contest the fact that the economic damages that are the subject of this case were the result of the "bodily injury" that Ms. Hannay sustained in the February 2007 accident. There is, therefore, no dispute that the work loss damages awarded to Ms. Hannay were directly

related to the physical injuries she sustained. What MDOT argues, instead, is that these economic damages are not recoverable because they are not themselves "bodily injury". As MDOT puts it, §1405 "allows a claimant to recover for physical or corporeal injury to the body, not for damages that result *because of* the bodily injury." Def's Brief, at 10 (emphasis in original).

This argument focuses its attention on the two words that were the subject of the *Wesche* decision - "bodily injury". MDOT's argument, however, fails to give due effect to the critical word that precedes this phrase. MCL 691.1405 specifies that a governmental entity "shall be *liable* for bodily injury" resulting from a governmental agent's negligent operation of a motor vehicle. There is nothing in the phrase "*liable* for bodily injury" that compels the conclusion that this liability does not extend to the consequences - economic or noneconomic - resulting from a corporeal injury. The Michigan Legislature in §1405 made governmental agencies *liable* for any "bodily injury" inflicted by one of its agents. There is no textual or logical reason not to extend that "liability" to each and every consequence of such a bodily injury. To put it somewhat differently, by making MDOT responsible for the economic damages that Ms. Hannay sustained as a direct result of the physical injuries she suffered in the February 2007 accident, *this Court would be making MDOT "liable for the bodily injury" caused by its agent.*

Indeed, it is entirely appropriate to read §1405 as compelling the conclusion that anything short of the full panoply of traditional tort remedies is inconsistent with the text of that statute. If MDOT is *not* held responsible for the economic damages directly resulting from the physical injuries that Ms. Hannay has sustained, then MDOT is *not* being held fully "liable for bodily injury" caused by a negligent driver in its employ.

In light of the Court's proclivity for dictionary definitions, consider the following two synonyms for "liable" provided Websters Third New International Dictionary - "responsible" and "answerable." Under §1405, a governmental entity is to be held *responsible* for a bodily injury.[4] Responsibility for a "bodily injury" particularly in a statute whose whole purpose is to outline immunity from *tort* liability, could certainly include all of the tort consequences of that "bodily injury". Similarly, holding MDOT *answerable* for the "bodily injury" caused to Ms. Hannay by one of MDOT's agents does not convey the notion that MDOT is somehow only responsible for the "bodily injury" itself, but not the economic and noneconomic damages that flow from that injury.[5]

Not only is this a plausible reading of the words "liable for bodily injury," it is an interpretation that directly follows from a decision of this Court rendered less than six months ago. In *In Re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013), the Court considered the question of whether a civil contempt petition seeking indemnification for damages from a governmental entity was barred by operation of the GTLA. This question called upon the Court to consider the meaning of MCL 691.1407(1)'s language that "a governmental agency is immune from *tort liability* if [it] is engaged in the exercise or discharge of a governmental function." (emphasis added).

Central to the *Bradley* Court's analysis was the term "tort liability" as used in §1407(1); if that language were broad enough to encompass the contempt indemnification sought in that case,

---

[4]These definitions are fully consistent with this Court's dictionary definition of "liable"'s cognate, "liability," that were applied in this Court's recent opinion in *In Re Bradley Estate,* 494 Mich 367, 385, n. 41; 835 NW2d 545 (2013). As will be seen, the analysis employed by the Court in *Bradley* is of considerable importance in a proper interpretation of §1405.

[5]Indeed, as will be discussed, *infra*, if MDOT's interpretation of §1405 were adopted, it and every other governmental entity would be answerable for little or nothing under a statute that was supposed to make all government agencies "liable for bodily injury" resulting from the negligent operation of a motor vehicle.

any such relief would be barred by the GTLA. After noting that the GTLA does not provide its own definition of the term "tort liability," the Court in *Bradley* turned first to the definition of "tort", which it derived from various common law principles. 494 Mich at 381-385. Having defined half of the term found in the first sentence of §1407(1), the Court addressed the meaning of the word "liability."

The *Bradley* Court's definition of that word is both illuminating and fully applicable to §1405's use of the phrase "liable for bodily injury." The Court in *Bradley* defined "liability" in §1407(1) as follows:

> MCL 691.1407(1) refers not merely to a "tort," nor to a "tort claim" nor to a "tort action," but to "tort *liability.*" The term "tort," therefore, describes the type of liability from which a governmental agency is immune. As commonly understood, the word "liability," refers to liableness, i.e., "the state or quality of being liable." To be "liable" means to be "legally responsible [.]" Construing the term "liability" along with the term "tort," it becomes apparent *that the Legislature intended "tort liability" to encompass legal responsibility* ***arising from*** *a tort.*
>
> 494 Mich at 385 (emphasis added).

The *Bradley* Court explicitly found that the Michigan Legislature, by using the term "tort liability" in §1407(1), meant to encompass within the scope of that statute any liability *"arising from a tort."* Precisely the same reasoning must be employed in construing the comparable language in §1405. When the Michigan Legislature in that statute made governmental entities "liable for bodily injury," it affixed liability for all injuries *"arising from"* a bodily injury. Under the definition of the word "liability" employed in *Bradley*, Ms. Hannay's damages cannot be limited exclusively to what MDOT perceives to be "bodily injury."

Further support for this interpretation of §1405 can be found in the implications of MDOT's argument in this case when the argument is combined with the holding in the Michigan Court of

Appeals recent decision in *Hunter v Sisco*, 300 Mich App 229; 832 NW2d 753 (2013).[6] Obviously, if MDOT's position in this case were adopted, no *economic* damages could ever be recovered in an action exempted from immunity under §1405. Moreover, in *Hunter*, a panel of the Court of Appeals held that *noneconomic* damages such as pain, suffering, stress and emotional upset do not constitute "bodily injury" for purposes of §1405 and, as a result, are not recoverable in an action governed by that statute.

Combining MDOT's argument with the holding in *Hunter* leaves substantial doubt whether *any* damages (other than "property damage") could ever be recovered in such a case. *See* Issue 2(D), *infra*. But, even if there was some narrow sliver of "bodily injury" liability that does not include either economic or the noneconomic damages dismissed in *Hunter*, the fact remains that to accept MDOT's position in this case, this Court would have to assume that the Michigan Legislature, by putting the words "bodily injury" in §1405, was creating a species of tort liability that has absolutely no statutory or common-law antecedent. To accept MDOT's position and conclude that §1405 was not meant to allow recovery for any damages resulting from a bodily injury, one would have to engage in the assumption that the Michigan Legislature was creating a type of damage recovery which - if it exists at all - has never existed before in Michigan law.

This is an extremely difficult assumption to engage in when one considers the statute that provides the general source of governmental immunity, §1407, the statute that was under consideration in *Bradley*. As discussed above, that statute specifies that, except as provided elsewhere in the GTLA, a governmental agency is immune from *tort* liability. Since §1407(1) provides immunity from "tort liability", it logically follows that, where a cause of action is exempted

---

[6]Another implication of the *Hunter* case is the subject of section II, D, *infra*.

from immunity under any of the six statutory exceptions, a governmental agency *is* subject to tort liability. Thus, reading §1405 for what it is, *i.e.*, an exception to the statutory grant of *tort* immunity, should lead to the conclusion that Ms. Hannay is entitled to her *tort* recovery, not some unheard of damage recovery in which an injured party can recover for "bodily injury," but none of the consequences of that "bodily injury."

The framework of the GTLA is designed to identify the circumstances in which a governmental agency or agent may be subject to tort liability. But, if MDOT's argument and the Court of Appeals ruling in *Hunter* were actually correct, it would mean that the "tort liability" imposed in §1405 has no relationship whatsoever to any "tort liability" that exists or has ever existed in Michigan law.[7]

Once again, the *Bradley* decision fully supports the view that the six exceptions to agency immunity contained in the GTLA give rise to *tort* liability:

> Under the statute, *all* suits that seek to impose "tort liability" for an agency's discharge of a governmental function are barred by the GTLA, subject to several exceptions that the Legislature has expressly provided for in the GTLA and in other statutes authorizing suit against governmental agencies.
>
> 494 Mich at 378.

As this quotation from *Bradley* indicates, where a cause of action against a governmental agency falls within one of the exceptions to governmental immunity, the agency involved is subject to liability in tort. If MDOT is correct in this case and the Court of Appeals properly interpreted

---

[7]Another statute indicating that the GTLA covers traditional *tort* liability is MCL 691.1412. That statute provides that all defenses to *tort* claims available to private parties may be claimed by a governmental agency or agent sued under terms of the GTLA. The language in §1412 reinforces the fact that the GTLA was designed to set out governmental liability consistent with traditional principles of *tort*.

§1405 in *Hunter*, a governmental entity sued in a case controlled by §1405 may or may not be subject to *any* liability, but if it is, that liability bears no resemblance whatsoever to *tort* liability.

Finally, plaintiff will attempt a brief (and, undoubtedly, impactless) discussion of the judicial "construction" of §1405. There are hundreds of Michigan cases expressing the view that the GTLA is to be construed "broadly" in favor of immunity and that the six statutory exceptions to that immunity are to be construed "narrowly." This case law, which MDOT predictably relies on, is so overwhelming that refutation of it is impossible.

But, in a judicial atmosphere in which statutes are to be applied as they are written, it is difficult to understand why certain statutes are to be construed "broadly" while some judicially less-favored statutes are to be construed "narrowly." One would assume that in this Court at present in which the *actual* language used in a statute is determinative, §1405 is to be construed according to its text; it is not to be "broadly" construed or "narrowly" construed. It is just to be construed according to its text.[8]

This would seem to be a particularly inappropriate approach to statutory interpretation when the Michigan Legislature is fully capable of incorporating into a statute instructions as to how courts are to construe its reach. Thus, the Michigan Legislature has dictated in language incorporated into a number of statutes that certain statutory provisions are to "be construed liberally" to accomplish their remedial purposes. *See* MCL 570.262; MCL 700.1201; MCL 600.3170(2); *cf* MCL 600.102.

---

[8]For a contrary view, the Court might examine the work of a former colleague who tried (not particularly successfully in the view of this writer) to justify a "broad" reading of immunity statutes and, perforce, a narrow reading of any exceptions to such immunity. Corrigan, "*Dice Loading" Rules of Statutory Interpretation,* 59 N.Y.U. Ann. Surv. Am. L. 231, 242-245 (2003). Far from convincing, this article fundamentally demonstrates that when a Court decides to construe a statute "broadly" or "narrowly", it is doing so on the basis of a highly subjective view of how "good" or "bad" that statute is.

When it chooses to, the Legislature can also specify that certain statutory provisions are to be narrowly construed. *See* MCL 28.435 (10).

Notably, there is no such legislative instruction in the GTLA. There is nothing in §1407 that says that it is to be construed broadly. Nor is there anything in §1405 indicating that it is to be narrowly construed. This means that, in dedicating itself to a "broad" or "narrow" construction of GTLA's grant of immunity or its exceptions, a court is fundamentally applying a judge-made rule that has not been endorsed by the Legislature. Such judge-made rules have not fared very well in recent years when they are designed to put a gloss on duly enacted statutes. *See e.g. Trentadue v Buckler Automatic Lawn Sprinkler Co.*, 479 Mich 378; 738 NW2d 664 (2007); *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562; 702 NW2d 539 (2005). It is difficult to see why these judge-made rules as to how statutory language is to be read should survive.

In any event, regardless of whether §1405 is construed broadly, narrowly or just construed, for the reasons outlined here, that statute has to be interpreted as allowing the work loss damages that the Court of Claims awarded Ms. Hannay.

C. The Holding In *Wesche* Does Not Preclude Ms. Hannay's Recovery Of Her Work Loss.

Ms. Hannay is also entitled to the recovery of her economic damages under the analysis employed by this Court in *Wesche*. Ms. Hannay's suit to recover the economic damages that are the direct result of the injuries she sustained in the February 13, 2007 accident is materially different from the consortium claim that was before the Court in *Wesche*. The Court's reasoning in *Wesche* bears this out.

In addressing the issue presented in that case, the Court made specific note of the fact that Mrs. Wesche "was not present at the accident scene and suffered no bodily injury" of her own. 480 Mich at 84. One assumes that this observation in *Wesche* was there for a reason. Thus, a fact of importance to the Court in *Wesche* was that Mrs. Wesche had suffered no bodily injury of her own.

The first and most obvious distinction to be drawn between this case and *Wesche* is that Ms. Hannay unquestionably suffered bodily injury. MDOT does not and cannot contest this fact. Nor does MDOT contend that the economic damages that Ms. Hannay proved at trial are not directly related to the bodily injury she sustained in the accident. MDOT's argument, therefore, distills to the contention that, even where an automobile accident caused by the negligence of a government employee causes bodily injury that results in economic loss to the plaintiff, those economic damages are not compensable under §1405.

This Court never suggested in *Wesche* that a plaintiff who sustains a "bodily injury" could not recover all of the traditional remedies available in tort for such an injury, including the economic loss resulting from that injury. Instead, the analysis employed by this Court in *Wesche* leads to the opposite conclusion.

The plaintiff in *Wesche* argued that once Mr. Wesche sustained a "bodily injury," all of the damages in any way related to that accident, including Mrs. Wesche's consortium claim, were recoverable under §1405. The Court rejected that argument, relying on the unique character of a consortium claim. The *Wesche* Court held that loss of consortium represented a nonphysical injury that "is not merely an item of damages." 480 Mich 85. Thus, the Court in *Wesche* found it significant that loss of consortium was an "independent cause of action," not a specific type of compensable damage flowing from a "bodily injury." The *Wesche* majority emphasized this

particular characteristic of a loss of consortium claim no less than seven times, repeatedly referring to loss of consortium as an "independent" or "separate" cause of action, distinct from the "bodily injury" claim giving rise to the case. *Id.*, at 79, 85 and fn. 11, 86. Once again, one has to assume that these seven references to this unique characteristic of a consortium claim found their way into the *Wesche* majority opinion because they actually meant something to the Court's ultimate holding.

Unlike the consortium claim at issue in *Wesche*, the economic injuries that the Court of Claims awarded to Ms. Hannay are, in fact, "an item of damages" in this personal injury action. Moreover, unlike the consortium theory before the Court in *Wesche*, Ms. Hannay's claim for work loss is not an independent cause of action. Rather, work loss is an "item of damages" directly related to the physical injuries that she sustained.

In its January 17, 2013 opinion, the Court of Appeals correctly identified the difference between the consortium claim involved in *Wesche* and Ms. Hannay's award of economic loss. The Court of Appeals found the *Wesche* decision distinguishable on two grounds, both of which were specifically mentioned in the *Wesche* majority opinion:

> The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the motor vehicle exception. *Wesche*, 480 Mich at 79. Applying a definition of bodily injury as being "a physical or corporeal injury to the body," the Court held that a loss of consortium claim is not recoverable because a plaintiff bringing a loss of consortium cause of action does not suffer a physical injury to the body nor is loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action. *Id.*, at 85.
>
> Here, it is clear, and defendant does not argue otherwise, that damages for wage loss and loss of services are not independent causes of action, but are merely types of items of damages that may be recovered because of the bodily injury sustained by plaintiff. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.

* * *

> Similarly, in this case, work loss and loss of services damages are items of damages that arise from the bodily injuries suffered by plaintiff. To hold otherwise would conflate the actual bodily injury requirement to maintain a motor vehicle cause of action against a governmental entity with the types of damages recoverable as a result of the bodily injury. To the contrary, we hold that the bodily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, work loss benefits and ordinary and necessary service benefits that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental entities, and the trial court did not err by awarding those economic damages to plaintiff in this case.
>
> 299 Mich App at 268-270.

The Court of Appeals did not have to scrutinize the facts in *Wesche* and this case in any great depth to come up with a basis for distinguishing the two. In point of fact, the Court of Appeals took its cues from this Court; it distinguished *Wesche* on the basis of the statements in the *Wesche* majority opinion explaining how the Court arrived at the result it did. The Court of Appeals was, therefore, faithful to the *Wesche* decision in finding that case distinguishable from this one.

D. The Words "Liable For Bodily Injury" In §1405 Have To Mean Something.

Seventy-five days after issuance of the Court of Appeals decision in this case, the Court of Appeals arrived at a decidedly different interpretation of §1405's "bodily injury" language in *Hunter v Sisco*. *Hunter* also involved an automobile accident that was the result of negligence committed by a governmental employee. As a result of that accident, the plaintiff in *Hunter* sustained a herniated disc in his lumbar spine. He claimed various forms of noneconomic damages arising out of these injuries, including "shock and emotional damage" as well as pain and suffering, stress and disappointment. *Id.*, at 235.

The defendant in *Hunter* argued that it could not be held liable for these noneconomic injuries because they did not constitute "bodily injury" for purposes of §1405. The *Hunter* Court found differences between "'bodily injury', 'personal injury' and emotional or psychological injuries . . ." *Id.*, at 238. Based on this perceived difference, the *Hunter* Court held that the noneconomic damages requested in that case were *not* recoverable in a case governed by §1405:

> Thus, it is clear from myriad cases and lay and legal resources that, if the Legislature wanted to permit plaintiffs to recover within the motor vehicle exception damages for pain and suffering or emotional shock or stress, it could have done so by providing for "personal injury" or emotional damages in the statute. See, for example MCL 600.6301; *Potter v McLeary,* 484 Mich. 397, 422 n. 30, 774 N.W.2d 1 (2009). Instead, in drafting MCL 691.1405, the Legislature chose to specifically limit the waiver of immunity to bodily injury and property damage. Thus, the *Wesche* definition of "bodily injury" is clearly correct, regardless whether we view "bodily injury" as a legal term of art or consider its commonly understood meaning. Because "bodily injury" encompasses only "a physical or corporeal injury to the body," *Wesche,* 480 Mich. at 85, 746 N.W.2d 847, the trial court erroneously ruled that plaintiff may recover damages for pain and suffering and "shock and emotional damage." Such damages simply do not constitute physical injury to the body and do not fall within the motor vehicle exception.
>
> *Id.*, at 240-241.[9]

---

[9]For what it is worth, it would appear that even MDOT viewed the result reached in *Hunter* as a stretch. The Court of Claims awarded Ms. Hannay both her work loss damages and noneconomic damages. (App. 67a-72a). While MDOT has obviously challenged the Court of Claims economic damages award, it paid Ms. Hannay the amount of the noneconomic damages that she was awarded. Apparently it should not have paid these damages , assuming *Hunter* were actually correct in its interpretation of §1405. MDOT's actions in this case confirm that even they have altogether understandable doubts about the decision rendered by the panel in *Hunter*. MDOT does comment in passing in its brief that it has already paid for Ms. Hannay's "bodily injury" by paying her noneconomic damage award. Def's Brief, at 9. In light of the fact that MDOT's brief was filed after release of the Court of Appeals decision in *Hunter*, MDOT had to know that this particular statement in its brief is inconsistent with a published decision of the Court of Appeals.

This Court, for reasons that are not readily apparent, issued an order on November 20, 2013, denying leave to appeal in *Hunter*. *Hunter v Sisco*, ___ Mich ___; 839 NW2d 202 (2013). This means that *Hunter* is now binding precedent on all lower courts. MCR 7.215(J).

Hunter precludes an award of *noneconomic* damages in a case governed by §1405. MDOT argues that Ms. Hannay (and, by extension, every single §1405 litigant) may not recover her *economic* damages. The combination of MDOT's argument and the *Hunter* decision raises a significant question - if a party injured in a vehicular accident with a governmental agent can recover neither economic nor noneconomic damages, what is there left to recover in a case governed by §1405?

The answer to this question is not readily apparent. If, as *Hunter* has held, pain and suffering is somehow distinct from "bodily injury", it is difficult to imagine what damages would be associated with what might be characterized as a "pure" bodily injury. The existence of *any* damages in a §1405 case is also cast into doubt by the assessment of that statute offered by MDOT in its brief. MDOT asserts in that brief: "While we might argue that such economic loss *results* from a physical or corporeal injury to the body, the Legislature did not provide the recovery of such consequential losses when it wrote §5." Def's Brief, at 9. (emphasis in original).

MDOT is, therefore, apparently of the view that any damages that *result from* a bodily injury are not recoverable under §1405. They are, according to MDOT, merely the "consequential" result of a "bodily injury." But, if MDOT were correct and any damages *resulting from* a bodily injury cannot be recovered in a case governed by §1405, *there are no damages recoverable under §1405*. This necessarily follows since, with but one limited exception, there is no compensable negligence

claim that does not *result from* a bodily injury.[10] This fact is demonstrated in this Court's decision in *Henry v Dow Chemical*, 473 Mich 63; 701 NW2d 684 (2005).

In *Henry*, the Court drew a distinction between injury and damages as it held that a plaintiff must first sustain a physical injury before being able to claim damages resulting from that injury. *Id.*, at 75. Thus, the *Henry* Court ruled that it had to "finely delineate[] the distinction between an 'injury' and the 'damages' *flowing therefrom.*" (emphasis added). *Id.*

As *Henry* makes clear, damages in tort necessarily *flow from* a physical injury. This means that *damages* in a cause of action in negligence, including one exempted from immunity by §1405, have to be the *result of* a bodily injury. Therefore, if one accepts MDOT's construction of this statute and no damages that *result from* a bodily injury are recoverable, it seems pretty obvious that, combining MDOT's argument in this case with *Hunter*'s equally wayward interpretation of §1405, leads to only one conclusion - there are *no* damages to be awarded for "bodily injury" in a case governed by §1405.

If MDOT and *Hunter* were correct, there really was no reason for the Michigan Legislature to include in §1405 any language that governmental entities "shall be liable for bodily injury." If MDOT and *Hunter* were correct, governmental agencies will be liable for "property damage" arising out of the negligence of its agents, but that is all. Car-driving agents of governmental agencies can negligently cause all the "bodily injury" they choose, their employers will not be liable for that injury since there is nothing they can be liable for.

---

[10]The limited exception to the nearly universal requirement of a physical injury to support a negligence claim is the so-called bystander doctrine. *See Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970).

It is axiomatic that in construing a statute, a court must arrive at an interpretation that does not render any part of that statute to be without effect. *In Re MCI Telecom Complaint*, 460 Mich 396, 414; 596 NW2d 164 (1999). Since MDOT's argument would appear to completely negate any liability that a governmental agency might have under §1405 for causing a "bodily injury", this argument has to be rejected.

However, as alluded to earlier, even if one could hypothesize some narrow band of damages available for a "pure" bodily injury, as opposed to the economic or noneconomic damages resulting from that injury, this too is significant. To accept the notion that §1405 provides for the recovery of damages for "bodily injury and bodily injury alone," as MDOT and *Hunter* suggest, one would have to accept the view that the Michigan Legislature, through the use of two words, enacted §1405 with a completely novel conception of recoverable damages. One would have to engage in the complete fantasy that the Michigan Legislature in two words fashioned an unparalleled system of tort liability, one in which governmental agencies would be liable for a yet-to-be-determined set of damages, while at the same time excused from any liability for economic or noneconomic damages that the negligence of its agents may have caused.[11]

E. MCL 691.1405 Has No Application To This Case Under MCL 500.3135(3).

Finally, MDOT's argument that Ms. Hannay cannot recover her work loss damages should be rejected as inconsistent with MCL 500.3135(3), the provision of the no fault act limiting tort liability in vehicular accident cases. That provision states in relevant part:

---

[11]And, as noted previously, this fantasy would have to be engaged in with knowledge that the Legislature passed three other related statutes within the same act which clearly provided for traditional, as opposed to never-heard-of-before, theories of tort liability.

> (3) *Notwithstanding any other provision of law*, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
>
> * * *
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections.
>
> MCL 500.3135(3) (emphasis added).

MCL 500.3135(3)(c) explicitly allows recovery in tort of certain economic damages, including work loss. That subsection begins with six words - "notwithstanding any other provision of law" - which indicate that the economic damages allowed under this provision are not to be limited or eliminated *by any other law*. The text of §3135(3)(c) provides that the economic damages called for by this provision, *i.e.* allowable expenses, work loss and survivor loss, cannot be limited by *any* law, including the "bodily injury" language of §1405 that MDOT relies on in this case.

Such a reading of §3135(3)(c) is supported by this Court's decision in *Hardy v County of Oakland*, 461 Mich 561; 607 NW2d 718 (2000). The plaintiff in *Hardy* sued a governmental entity for noneconomic damages sustained in an automobile accident. Plaintiff argued that, because §1405 does not establish an injury threshold for the recovery of tort damages, the "serious impairment of body function" threshold provided in MCL 500.3135 is inapplicable. This Court held in *Hardy* that the statement of a governmental entity's liability under §1405, which is completely silent on a threshold level of injury, had to give way to the requirements of §3135 of the no fault act. The *Hardy* Court held that §3135 reflected "the Legislature's determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute." 461 Mich at 565.

Comparable analysis should be applied here. The Legislature has specified that notwithstanding any other provision of law, in a case arising out of the ownership, operation or use of a motor vehicle, tort liability exists for the work loss benefits that Ms. Hannay sought in this case.

II. THE COURT OF CLAIMS CORRECTLY AWARDED MS. HANNAY WORK LOSS BASED ON AMOUNTS SHE WOULD HAVE EARNED AS A DENTAL HYGIENIST BUT FOR THE INJURIES SHE SUSTAINED IN THE ACCIDENT.

The second issue on which the Court has granted leave is "whether the evidence in this case establishes that plaintiff incurred a loss of income from work that she would have performed as opposed to loss of earning capacity." The Court of Claims ruled that Ms. Hannay could recover 60% of the amount she would have earned as a dental hygienist.[12] MDOT argues that it was inappropriate for the trial court to assess work loss benefits based on amounts earned by a dental hygienist since, at the time of the accident, Ms. Hannay did not yet have a job in that field.

MDOT packages this issue as a purely legal question. MDOT is wrong. The question of what amounts Ms. Hannay *would be* earning were it not for her injuries is one of fact, dependent on the proofs presented at trial. The Court of Claims made the requisite findings of fact. It is these findings that control the question of Ms. Hannay's entitlement to work loss benefits.

Work loss benefits recoverable under §3135(3)(c), "compensate the injured person for income he would have received but for the accident." *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984); *Ouellette v Kenealy*, 424 Mich 83, 86; 378 NW2d 470 (1985); *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 645; 513 NW2d 799 (1994). The Court of Claims found on the basis of the evidence presented at trial that, but for the accident, Ms.

---

[12]The 60% figure was based on the Court of Claims finding that Ms. Hannay would have worked only part-time as a dental hygienist once her training was complete.

Hannay *would* have earned income as a dental hygienist. (App. 71a-72a).[13] The Court of Claims findings of fact "may not be set aside unless clearly erroneous." MCR 2.613(C).

The significance of the trial court's findings as to what Ms. Hannay *would* have earned is conclusively demonstrated in this Court's decision in *Gobler v Auto-Owners Ins* Co, 428 Mich 51; 404 NW2d 199 (1987). In that case, plaintiff's husband died in an automobile accident. At the time of that accident, plaintiff's husband was an unemployed, full-time college student, planning a career in forestry. The plaintiff in *Gobler* sued to recover survivors' loss benefits under MCL 500.3108. Like the work loss question presented in this case, MCL 500.3108 pertains to support that a survivor "*would have* received" from the deceased. Thus, the question presented in *Gobler* - whether a college student *would have* income in the future in a particular profession - is directly comparable to the work loss issue presented in this case.

The trial court in *Gobler* made a number of important factual findings supportive of the plaintiff's claim that her husband would have earned money in the future in the field of forestry. This Court affirmed the circuit court's ruling awarding benefits. In doing so, the Court recognized that its decision turned on the factual findings made by the trial court:

> The trial court in turn *found as fact* that Gobler would have been employed by the forestry service had he survived the accident. Before we can reverse the findings of fact of a trial court, we must be firmly convinced that a mistake has been made. We are not convinced that the trial court made a mistake in *its factfinding.*

---

[13]There is no question that the Court of Claims, in making its findings of fact with respect to work loss, applied the appropriate legal standard. The difference between work loss and the traditional tort economic damage for lost income, *i.e.* loss of earning capacity, is that the former is based on what an injured party *would* have earned, while the latter is calculated on what that party *could* have earned. *Marquis,* 444 Mich at 647-648. The Court of Claims used the correct legal standard for work loss when it made findings as to what Ms. Hannay *would* have earned as a dental hygenist. (App. 71a-72a).

428 Mich at 66 (emphasis added).

The Court's analysis in *Gobler* establishes both the significance of a trial court's findings in a case of this type as well as the considerable deference an appellate court must give these findings. *See also Grier v DAIIE*, 160 Mich App 687, 690; 408 NW2d 429 (1987) ("[t]o what extent wages would have been received but for the injury is a question of fact upon which proofs must be submitted.") This case, like *Gobler*, comes before this Court after the trial court made explicit findings that Ms. Hannay *would have* had a career as a dental hygienist. Consistent with *Gobler*, these findings may only be set aside if clearly erroneous. Under the review standard set out in MCR 2.613(C), a trial court's findings of fact following a bench trial cannot be reversed unless the reviewing court "is left with a definite and firm conviction that a mistake has been made." *In Re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003); *Douglas v Allstate Ins Co*, 492 Mich 241, 256-257; 821 NW2d 472 (2012).

The Court of Claims found, based on uncontradicted evidence presented at trial by Dr. Johnston and Mrs. Johnston, that Ms. Hannay "would more likely than not have been admitted to the Dental Hygienist program at LCC." (App. 71a). The trial court further found, again based on the Johnstons' testimony that, once admitted to the program, Ms. Hannay would have completed it. (App. 72a). The Court of Claims also found ample evidence in the trial record that, based on promises made to her by Dr. Johnston, Ms. Hannay would have been hired as a dental hygienist after she finished her training and that her starting pay in that position would be $28.00 to $31.00 per hour. (App. 72a).

Each of these findings was critical to the resolution of the *factual* question presented at trial - what Ms. Hannay would have earned had she not been injured in the February 2007 accident. The

Court of Claims not only had sufficient evidence in the trial record to support its finding that Ms. Hannay would have been employed as a dental hygenist, that evidence was unrebutted. MDOT presented no evidence to suggest that Ms. Hannay would not have been admitted to the LCC hygenist program, no evidence that Ms. Hannay would not have completed that program and no evidence that she would not have had a job working in Dr. Johnston's office. Under these circumstances it is impossible for MDOT to leave the Court with a "definite and firm conviction" that the Court of Claims was mistaken when it awarded Ms. Hannay work loss at the rate of a dental hygenist.

On appeal MDOT has not challenged the trial court's findings as clearly erroneous. MDOT does, however, suggest that the trial judge erred in reaching the conclusion it did because their was no "guarantee" that Ms. Hannay would have earned money as a dental hygenist. But, the question is not whether the trial court had to have evidence completely guaranteeing that Ms. Hannay would be working as a dental hygenist. Rather, the question is whether, based on the evidence before it, the trial judge properly concluded that *more likely that not* Ms. Hannay would have been working and earning money as a dental hygenist.

In a similar vein, MDOT asserts that the Court of Claims findings with respect to Ms. Hannay's work loss should be disregarded as "speculative." There is, of course, an element of speculation as to what Ms. Hannay would have been doing from a professional perspective if the accident had never occurred. The negligence of MDOT's agent, which eliminated any chance of Ms. Hannay realizing her chosen career path, has seen to it that the question of how Ms. Hannay would have been employed will remain at least to some extent in the realm of speculation. We will not be

able to say with complete assurance how Ms. Hannay's career would have progressed precisely because the negligence of MDOT's employee made that career impossible.

But, MDOT cannot profit from the necessary uncertainty over Ms. Hannay's future that its agent has caused. The Court has recognized that "[t]he law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. *Muskegon Agency, Inc. v General Telephone of Michigan*, 350 Mich 41, 50; 85 NW2d 170 (1957); *McCullagh v Goodyear Tire & Rubber Co*, 342 Mich 244, 254; 69 NW2d 731 (1955). As this Court succinctly put it in *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965), in awarding damages, "[w]e do the best we can with what we have."

Here, the Court of Claims had a lot to work with in reaching a finding with respect to work loss that was well removed from speculation. The Court of Claims had Ms. Hannay's testimony as to what she would have been doing to earn money if she had not been injured. But, it also had the testimony of two professionals in the field of dentistry who were familiar with Ms. Hannay and her abilities and were able to testify competently as to where those abilities *would* have taken Ms. Hannay.

Rather than attacking the trial court's factual findings, MDOT turns to case law to locate support its contention that Ms. Hannay may not recover her work loss. The appellate decisions that MDOT cites in its brief are obviously based on the specific facts of each case. These cases, therefore, do nothing to undermine the Court of Claims findings in *this* case, nor do they render the factual findings made in *this* case clearly erroneous. Nevertheless, because MDOT relies so heavily on this case law, this brief will review the relevant cases in this area.

A logical place to begin this discussion are four decisions of this Court previously cited in this brief, *MacDonald, Oullette, Marquis* and *Gobler*. In *MacDonald*, the Court examined the concept of work loss in a case based on MCL 500.3107. The *MacDonald* Court noted that the concept of work loss in that statute was taken from the same language contained in the Uniform Motor Vehicle Accident Reparations Act (UMVARA). Thus, in *MacDonald* the Court cited at length from the UMVARA's commentary with respect to "work loss":

> "Work loss", as are other components of loss, is restricted to accrued loss, and this covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss . . . *Work loss is not restricted to the injured person's wage level at the time of injury. For example, an unemployed college student who was permanently disabled could claim loss, at an appropriate time after injury, for work he would then be performing had he not been injured.* Conversely, an employed person's claim for work loss would be appropriately adjusted at the time he would have retired from his employment.
>
> *MacDonald*, 419 Mich at 151, *citing* 14 Uniform Laws Annotated, p. 46 (emphasis added).

The UMVARA's commentary cited with approval in *MacDonald* makes it clear that work loss is not to be equated with the traditional tort concept of loss of earning capacity. Despite that fact, the UMVARA commentary acknowledges that work loss is not necessarily restricted to the injured person's wages as of the time of his/her injury. Moreover, that commentary specifically indicates that an unemployed college student who is permanently disabled would be entitled to work loss benefits.

The portion of the UMVARA's commentary describing the potential work loss of an unemployed college student that was originally cited with approval in *MacDonald* was repeated in

the Court's later rulings in *Oullette* and *Marquis*. *Oullette*, 424 Mich at 87; *Marquis*, 444 Mich at 645. The work loss discussion in *MacDonald, Oullette* and *Marquis* fully supports the result reached by the Court of Appeals in this case. Ms. Hannay was a college student who had not yet reached her career goal of a dental hygienist. Yet, under the analysis in these three cases, she was entitled to claim such damages "at an appropriate time after injury, for work [she] would then be performing."

The fourth decision of this Court relevant on this subject is *Gobler*, which has been discussed previously. As noted, the no fault benefit at issue in the *Gobler* case required proof of what a dependent *would have received* from her husband who was killed in a vehicular accident. MCL 500.3108. The deceased in *Gobler* was a college student who was unemployed at the time of his death. The deceased had selected a post-graduate career in forestry and he had received what amounted to a job offer in that area. The circuit court found that this unemployed college student *would have* been employed in his chosen field after he graduated and, on that basis, awarded survivors benefits to his widow.

This Court ruling in *Gobler* is entirely consistent with the results reached by the Court of Claims in this case. Like the deceased in *Gobler*, Ms. Hannay had selected a career, she was steadily advancing toward a job in her area of interest, and she had been offered a job in her field after graduating. *See also Swartout v State Farm Mutual Auto Ins Co*, 156 Mich App 350, 354; 401 NW2d 364 (1987); *Sullivan v North River Ins Co*, 238 Mich App 433; 606 NW2d 383 (1999).

To summarize, Ms. Hannay presented all of the evidence necessary to support her recovery of work loss based on her post-accident inability to perform the work of a dental hygienist. She was a young woman who for many years had a single career goal, to become a dental hygienist. She was highly motivated to achieve that goal and, as Dr. Johnston described her, she was "destined to work

in a dental office." (App. 39b). Mrs. Johnston spoke of Ms. Hannay's passion for her work in a dental office. (App. 39b). Moreover, the trial record established that, prior to her accident, Ms. Hannay possessed all of the skills necessary to achieve her career goals. As Mrs. Johnston testified, Ms. Hannay had the "whole package" of talents necessary to become a very good dental hygienist. (*Id*).

In addition, Mrs. Johnston's unequivocal and unchallenged trial testimony established that Ms. Hannay *would* (not merely could) be accepted into LCC's dental hygienist program. (App. 8b, 38b-39b). The evidence also supported the Court of Claims conclusion that Ms. Hannay *would* (not merely could) complete that program successfully. (App. 15b-16b, 36b). The evidence further established that, with her training behind her, Ms. Hannay *would* (not merely could) be employed by Dr. Johnson as a dental hygienist. (App. 44a). Finally, there was unchallenged evidence that, in her job as a dental hygienist, Ms. Hannay *would* (not merely could) earn $25.00 per hour in her job. (*Id*).[14]

The trial court was charged with the responsibility of determining what more likely than not *would* have happened to Ms. Hannay but for the February 2007 accident. That is precisely what the Court of Claims did as it correctly found that, were it not for that accident, Ms. Hannay *would* have

---

[14]MDOT's brief's gratuitous hyperbole actually serves to demonstrate why the Court of Claims award based on Ms. Hannay's becoming a dental hygenist was entirely appropriate. According to MDOT, what the trial judge did in this case would allow any plaintiff "to simply assert, 'I would have been a doctor,' or 'a CEO,' or "the Governor,' and lost income would have to be calculated based on that fictional career." Def's Brief, at 1. But, Ms. Hannay did not seek work loss commensurate with the amount earned by a doctor (or even a dentist), or a CEO or the Governor. If she had and the trial judge had agreed and awarded work loss on the basis of these positions, MDOT would have a dandy argument for reversal since such a determination would be clearly erroneous. But, the Court should compare these hypothetical "fictional" jobs that MDOT supposes with the actual job being claimed in this case as well as Ms. Hannay's qualifications and progress toward that job. The difference is substantial.

earned income as a dental hygienist. The Court of Appeals was entirely correct in upholding that finding.

RELIEF REQUESTED

Based on the foregoing, plaintiff-appellee, Heather Lynn Hannay, respectfully requests that the Court affirm the Court of Appeals January 17, 2013 decision in its entirety.

MARK GRANZOTTO, P.C.

MARK GRANZOTTO (P31492)
Attorney for Plaintiff-Appellee
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

GURSTEN, KOLTONOW, GURSTEN, CHRISTENSEN & RAITT, P.C.

DAVID E. CHRISTENSEN (P45374)
Attorney for Plaintiff-Appellee
30101 Northwestern Highway
Farmington Hills, MI 48334
(248) 353-7575

Dated: January 22, 2014